

Message

---

**From:** McLusky, Robert G. [RMCLUSKY@jacksonkelly.com]  
**Sent:** 8/7/2018 9:01:40 PM  
**To:** Day, Christopher [Day.Christopher@epa.gov]  
**CC:** Gable, Kelly [Gable.Kelly@epa.gov]  
**Subject:** RE: Clean Water Act §401 Certification Modifications

Thanks much. I'm generally around the next week or so and can respond to questions or put Kelly in touch with WVDEP's counsel.

Bob

---

**From:** Day, Christopher [mailto:Day.Christopher@epa.gov]  
**Sent:** Tuesday, August 07, 2018 4:59 PM  
**To:** McLusky, Robert G.  
**Cc:** Gable, Kelly  
**Subject:** RE: Clean Water Act §401 Certification Modifications

Thanks Bob – That helps fill in the details and some of the nuances. I have assigned this matter to Kelly in my office to look into further, and have passed on this email and attachments. She will get in touch with you as appropriate.

Her contact info is as follows:

Email: [Gable.Kelly@epa.gov](mailto:Gable.Kelly@epa.gov)  
Phone: 215-814-2471

Christopher Day  
Acting Chief, Water Law Branch  
EPA Region III (3RC20)  
(215) 814-2481

---

**From:** McLusky, Robert G. [mailto:RMCLUSKY@jacksonkelly.com]  
**Sent:** Tuesday, August 07, 2018 2:57 PM  
**To:** Day, Christopher <[Day.Christopher@epa.gov](mailto:Day.Christopher@epa.gov)>  
**Cc:** Sibley, Trey <[gsibley@hunton.com](mailto:gsibley@hunton.com)>  
**Subject:** Clean Water Act §401 Certification Modifications

Chris: Thank you for calling yesterday. The WVDEP issued a "blanket" Clean Water Act § 401 certification for the Corps' 2017 Nationwide 404 Permits in the spring of 2017. The certification included a number of "Special Conditions" on NWP 12, which authorizes fills associated with utility line construction. One of the Special Conditions has been interpreted by opponents of natural gas pipelines as restricting the time for all water crossings to 72 hours.

Both WVDEP and the Corps have argued that such a reading impermissibly restricts the Corps from authorizing or requiring the use of more restrictive and environmentally protective crossing measures that could take longer than 72 hours. Attached are two briefs filed by the Corps in a pending case

before the 4<sup>th</sup> Circuit in which these issues are being played out. David Gunter at DOJ represents the United States in the proceeding. His contact information is in the attached brief. We represent Mountain Valley Pipeline, along with Trey Sibley at Hunton Andrews Kurth (cc'd on this note).

To remove any doubt about its intentions in certifying NWP 12 and to ensure that agencies have the flexibility to authorize more protective crossing plans that will utilize more than 72 hours, WVDEP has just announced a proposal to modify to its 2017 blanket certification of the NWPs. A link to its proposal appears here: [Public Notice Draft of WV NWP 401 Certification Modification](#)

At least one entity, however, has identified 40 CFR §121.2(b) as potentially requiring agreement between the State, the permit issuing body and the EPA RA before any modification to a State-issued 401 certification can take effect. It is an odd requirement given that EPA agreement is not required for a 401 certification in the first place, and could be an artifact of a time when EPA was the primary permitting authority for a number of environmental permits. If EPA believes that the rule has no application then we would like confirmation of that fact. If, on the other hand, it believes the rule applies to this circumstance, MVP would like to meet with and explain the issue to the Regional Administrator and his staff at their earliest convenience.

Bob

**Robert McLusky** | Member | Jackson Kelly PLLC

500 Lee Street East , P.O. Box 553, Suite 1600 | Charleston, WV 25301-320225322-0553 |

[www.JacksonKelly.com](http://www.JacksonKelly.com)

Office: (304) 340-1381 | Mobile: (304) 539-8381 | Fax: (304) 340-1272 | [rmclusky@JacksonKelly.com](mailto:rmclusky@JacksonKelly.com) | V-card |

**BIO**

CONFIDENTIALITY NOTE: This email message from the law office of Jackson Kelly PLLC is for the sole use of the intended recipient or recipients and may contain confidential and privileged information. Any unauthorized review, use, disclosure, distribution, or other dissemination of this e-mail message and/or the information contained therein is strictly prohibited. If you are not the intended recipient of this e-mail message, please contact the sender by reply e-mail and destroy all copies of the original message.